Beatrice/Hunt-Wesson, Inc., Peter Pan Plant *and* International Brotherhood of Firemen and Oilers, AFL–CIO. Case 10–CA–23294

March 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On September 30, 1988, Administrative Law Judge Howard I. Grossman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN STEPHENS, concurring.

I join my colleagues in ordering a dismissal of the complaint but write separately to underscore the significance of this decision, and to offer a fuller explication of why the result here is defensible notwithstanding the contrary indications of some of the Board's precedents. Although the factual pattern is a familiar one,[1] this case appears to be the first instance in which the Board has excused an employer's refusal to execute a bargaining agreement on the ground that the agreement was not properly ratified by the affected employees.

I.

Facts were brought to the Respondent's attention suggesting that the Union had dispensed with ratification by unit employees after the employees, in three successive votes over several months, rejected the contract. Instead, the Union obtained what it considered to be adequate ratification from a vote of the union members, which actually consisted of just one individual. The judge found merit in the Employer's defense that the Union had not abided by a written memorandum initialed between the parties' bargaining representatives that called for the contract to be ratified by the *unit* employees (not just the union members).

On appeal, the General Counsel insists that the judge's recommended decision cannot be squared with a long line of cases in which the Board barred the employer from objecting to the manner in which a purported ratification vote was obtained. These cases generally stand for the principle that the employer cannot refuse to execute the agreement, once the union communicates its unqualified acceptance of the contract regardless of the outcome of the ratification vote.[2] This rule appears to emanate from several policies of the Act. First, the Act, in bestowing exclusive representational status to the union, empowers it to enter into binding labor agreements with an employer. Once union representatives manifest final assent to a particular agreement, a binding contract is created and the parties' obligation to execute under Section 8(d) arises without further ado. Because the union is the exclusive representative, the employer is foreclosed from dealing directly with employees on an individual basis.[3] However, the issue in turn arises whether the union's collective power of contractual assent is exercisable by the union leadership (in conjunction with the negotiators acting as agents), without the formal participation of the rank-and-file members. In other words, how democratic must a union be in its decision making? The Act does not directly answer this question, but settled judicial interpretation of the LMRDA holds that a union institutionally has the discretion to grant or with-

[1] We agree with the judge's finding that the parties agreed that the ratification by the bargaining unit was a condition precedent to a binding contract. We particularly rely on the parties' agreement during their November 17, 1987 negotiations sessions, as reflected in the memorandum of agreement executed November 18, 1987, to submit their ''tentative agreement'' containing a controversial wage proposal for ratification by the bargaining unit members. Thus, rather than the Union imposing the limitation of ratification on itself, both parties in the instant case agreed to require ratification by the bargaining unit members to make their ''tentative agreement'' binding. We do not, however, rely on the Union's organizational campaign literature stating that employees could vote on contracts or on the fact that the Union submitted the contract to ratification votes.

The General Counsel, relying on *Childers Products Co*., 276 NLRB 709 (1985), affd. mem. 791 F.2d 915 (3d Cir. 1986), asserts that the Respondent does not have standing to challenge the Union's method of ratification because it is an internal procedure within the Union's exclusive domain and control. In *Childers*, after the parties reached agreement on all terms, the union negotiator wrote down all the terms on the union's standard form and added the union's stock line, ''THIS AGREEMENT SUBJECT TO RATIFICATION.'' Unlike here, the employer and union in *Childers* never established during negotiations what the union meant by ''ratification,'' nor did they even discuss ratification during their negotiations. Therefore, the method of ratification was left for the union to determine. In contrast, the Respondent and Union here agreed that ratification by bargaining unit members was a precondition to the contract and discussed the ratification process. Thus, ratification was clearly defined and not left to the Union's internal procedures.

[1] The issue has arisen with some frequency. See, e.g., *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989) (and cases cited therein), enfd. 915 F.2d 631 (11th Cir. 1990); *Sacramento Union*, 296 NLRB 477 (1989) (and cases cited therein); *Hickory Farms of Ohio*, 222 NLRB 418 (1976), enfd. 558 F.2d 526 (9th Cir. 1977). See also *Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30 (1990) (union refuses to execute contract on ground that ratification procedure not properly followed; violation found).

[2] *Newtown Corp*., 280 NLRB 350, 351 (1986), enfd. 819 F.2d 677 (6th Cir. 1987); *Childers Products Co*., 276 NLRB 709, 711 (1985); *Seneca Environmental Products*, 243 NLRB 624 (1979); *Consumat Systems*, 273 NLRB 410, 413 (1984); *Martin J. Barry Co*., 241 NLRB 1011 (1979); *Mt. Airy Psychiatric Center*, 230 NLRB 668, 678–679 (1977); *C & W Lektra Bat Co*., 209 NLRB 1038 (1974); *M & M Oldsmobile*, 156 NLRB 903, 905 (1966), enfd. on other grounds 377 F.2d 712 (2d Cir. 1967); *North Country Motors*, 146 NLRB 671, 673 (1964).

[3] See *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

hold from members the right to ratify contracts.[4] Our Act does complement this rule to the extent that it generally does not permit employers to interfere with the manner in which a union structures its relationship with its members.[5] Just as an employer cannot insist to impasse on ratification as a term of any bargaining agreement, the reasoning goes, neither should the employer be given standing to investigate or to object to whether a ratification vote was properly conducted. To hold otherwise, the Board has added, would create the prospect of ''protracted litigation regarding the union's compliance with its own procedures,'' thereby encouraging industrial instability.[6]

The judge thought that what distinguished the instant case was the fact that the parties had a written memorandum containing an ''express'' term calling for the *unit* employees—not just union members (which is typically the voting class)—to ratify the contract before it became effective. Although the judge's discussion of the pertinent case law is sparse, the very precedents in which the Board has consistently foreclosed employers from objecting to the ratification procedure do posit a distinction that seems to support his conclusion. That distinction is between a ratification requirement that the union imposes on itself (typically through its constitution or bylaws) and one that is incorporated in an ''express'' agreement between a union and an employer.[7]

In the case of self-imposed ratification, which probably describes the prevailing practice, the union during negotiations announces to the employer the fact that the union's internal procedures require the submission of any eventual agreement to an employee vote. Although an employer may signal its acquiescence to this procedure, such a response is properly understood as only a tacit acknowledgement of a precondition that may have to be satisfied before the contract becomes finally effective. In other words, the union's purpose of notifying the employer is not to secure its assent (or ''express'' agreement) in the sense of obtaining some bargained-for consideration from the employer in exchange for a binding obligation to hold a ratification vote in a particularly prescribed manner. Thus, the fact that ultimately there may be deficiencies or irregularities in the ratification violates no contractual commitment owed to the employer. Indeed, in some circumstances, under the doctrine of apparent authority, an employer may even be entitled to rely on the representations of union officials that an enforceable contract has been concluded.[8] In contrast, an employer does have a basis to object where there is evidence that the union voluntarily submitted to negotiation, and the parties reached ''express'' agreement on, any of the details of ratification. Until such time as the union conducts a ratification vote in accordance with the parties' agreement, an employer is not obligated under Section 8(d) to execute the contract.

Although the notion of an ''express'' ratification agreement is not hard to comprehend conceptually, I do not believe that the Board's opinions have been especially helpful as analytical tools. In the first place, the Board has occasionally expressed itself in terms that on the surface seem illogical. A case in point is *Martin J. Barry Co.*, in which the Board in explaining *North Country Motors*, supra, said:

> [A]lthough the union there involved undertook to achieve ratification of the contract, no requirement that this occur was ever incorporated into the written contract. . . .
>
> Furthermore, *even if ratification were a precondition, we find that Respondent [employer] has no standing to question the validity of procedures used by the Union in ratifying the agreement.* It is well settled that ratification is an internal union matter which is not subject to question by an employer.[9] [Emphasis added.]

The problem posed by this excerpt, as I see it, is that the latter paragraph, that unequivocally says that employers have no standing to challenge a union's internal affairs, renders irrelevant any consideration that the initial paragraph gives to whether the parties have an ''express'' agreement on ratification. Perhaps it is because the Board has heretofore not found any ratification agreement sufficiently ''express'' that the Board has not had occasion to explain how an employer

[4] *Central States Southeast & Southwest Areas Pension Fund v. Sealtest Foods*, 799 F.2d 1098, 1111 (6th Cir. 1986). Where a union does afford members a right to vote for ratification, it must do so in a nondiscriminatory manner. *American Postal Workers v. American Postal Workers*, 665 F.2d 1096, 1101 (D.C. Cir. 1981).

[5] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The frequently cited circuit authority for this proposition is *Houchens Market of Elizabethtown v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967).

[6] *M & M Oldsmobile*, 156 NLRB 903, 905 (1966), enfd. on other grounds 377 F.2d 712.

[7] In the seminal case of *North Country Motors*, supra, 146 NLRB at 673, the Board refused to permit the employer to question the manner in which the union obtained employee ratification of the contract. However, the Board, by implication, left open the possibility of a different result had there been ''probative evidence'' that the union ''had agreed that the [employer] could condition execution of the contract upon ratification of any sort, [such as] by a majority or even a representative employee group.'' The same implication is found in *Houchens Market of Elizabethtown*, supra, 155 NLRB 729, 730, enfd. 375 F.2d 208; *Newtown Corp.*, supra, 280 NLRB at 350 (''no evidence . . . that the proposed contract's express terms required ratification or that the parties had ever agreed to a ratification requirement''); *C & W Lektra Bat Co.*, supra, 209 NLRB at 1039 (''We require more specific proof . . . of an agreement to make ratification a condition precedent to a collective-bargaining agreement [citation omitted]. There is no evidence that the parties agreed in express words to such a condition.'').

[8] See *Teamsters Local 100 (Duro Paper Bag)*, 216 NLRB 1070 (1975), enfd. 532 F.2d 569, 571 (6th Cir. 1976); *Elevator Constructors Local 8 (National Elevator)*, 185 NLRB 769, 773–774 (1970), enfd. 465 F.2d 974 (9th Cir. 1972). In these cases, the employers found it in their interest to ignore the fact that ratification was not obtained and successfully obtained enforcement of the contract.

[9] 241 NLRB 1011, 1013 (1979). Accord: *M & M Oldsmobile*, supra, 156 NLRB at 905.

could ever invoke such an ''express'' agreement in the face of a rule that on policy grounds flatly denies standing to challenge the adequacy of ratification.

Another difficulty posed by some of the cases is their intimation that nothing short of a formal *written* document will fulfill the requirement that a ratification agreement be ''express.''[10] Of course, in the instant case, the judge did find that a hand written document, executed by the bargainers and explicitly stating that the unit employees must ratify the contract, satisfied the standard. But as a general matter the notion that only a written understanding should render employee ratification a binding, unwaivable precondition to an employer's obligation to execute under Section 8(d) seems at odds with the principles that call for labor contracts to be interpreted not only by the written word but also by the negotiations and established practices that comprise the bargaining history.[11] An oral understanding can be just as controlling as a written one.

To me, these difficulties that are posed by some of the precedents may be avoided by recasting the issue as one involving the voluntary waiver of a union's statutory rights—the evidence of which be clear and unmistakable.[12] As noted above, employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs. As much as employee ratification can promote the virtue of union democracy and, in particular, can assist a union in garnering support among rank-and-file members for a proposed contract,[13] it can operate as a restraint on the ability of a union to negotiate terms. A union may be willing to enter into an agreement that it believes is in the best, long-term collective interests of union members but that may not enjoy their immediate, widespread support. For this reason, it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives.

Thus, where a union is not under any preexisting obligation to its employees to secure ratification, the inquiry probably is fairly straightforward, because the parties would not likely bring up the matter unless they intended to make it a part of the bargain. However, where a union's constitution or bylaws impose such an obligation, the Board's task is more complicated. For as noted, any reference to ratification during negotiations may have a more ambiguous import: The union may be simply informing the employer of the need to follow the internal procedure as a final step before implementation of the contract; in such a situation it is normally of no consequence to the employer whether the procedure is correctly concluded. Or, the parties may intend that employee ratification is a condition to be fulfilled in a manner not prescribed by, or at variance with, the union's constitution or bylaws. Given the Board's extensive experience in adjudicating waivers of statutory rights, it is certainly not a daunting task for the Board to determine from the relevant documents and circumstances attending the negotiations the extent to which employee ratification became part of the contractual bargain.[14]

Waivers of statutory rights, including those involving the union's relationship with its members, do not occur in a vacuum, but can be part and parcel of a union's efforts to enhance the well-being of its members, financial and otherwise. And the Act grants the union considerable latitude in ordering its agenda as well as managing its affairs. Illustrative of this point is the factual background of *Toledo Blade Co.*,[15] in which the union had found it advantageous during the

[10] See *Martin J. Barry Co.*, supra, 241 NLRB at 1012, 1013 and fn. 13; *C & W Lektra Bat Co.*, supra, 209 NLRB at 1039. The Board's reasoning in *C & W Lektra Bat* suggests that it was strongly influenced by the rule developed under the Board's contract-bar doctrine, which governs the processing of representation petitions. Among the many rules announced in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), was the one pertaining to executed contracts that are not yet ratified: Where the written contract does not expressly include a ratification provision, the contract will nevertheless operate as a bar; on the other hand, where the written contract does include an express ratification provision, the contract will not be given bar status until ratification is concluded. Expediting the election process was the reason for the Board's apparent indifference to any understandings that the parties had not incorporated in a written document. The Board wanted to avoid the protracted litigation over what the parties had agreed to with respect to ratification. Id. at 1162–1163. However, former Chairman Miller, who dissented in *Lektra Bat*, faulted the majority opinion on this point and would have upheld the judge's findings that based on the circumstances surrounding the negotiations the parties did have an express, binding understanding regarding ratification.

[11] *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986).

[12] See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

[13] See *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986).

[14] That disputes over ratification agreements lend themselves to a waiver analysis was implicitly demonstrated in *Hickory Farms of Ohio*, supra, whose facts are somewhat similar to the instant one. An employer refused to execute a contract on the ground that the union had not obtained proper ratification. The employer relied on a clause that it had inserted in the contractual document (on the mistaken belief that the union had agreed to it) and that the union had apparently not noticed. Citing *C & W Lektra Bat*, supra, as authority for the ''express'' agreement rule, the court observed that the requirement of '''specific proof' of 'an agreement to make ratification a condition precedent to a collective bargaining agreement'. . . is intended to make the evidentiary burden of the party in [the respondent employer's] position more onerous.'' The court, after analyzing the history of the negotiations, upheld the trial judge's factual findings that the union had not really intended that final implementation of the agreement was conditioned on ratification.

See also *Nichols Homeshield, Inc., Amsco Division*, NLRB General Counsel Advice Memo., Case 18–CA–8439, 11 NLRB Adv. Mem. Rptr. Par. 21014, 114 LRRM 1287 (1983), in which the General Counsel dismissed a union charge against an employer for refusing to execute a contract. The employer and the union had initially reached agreement on all terms and conditions of employment, subject to ratification. However, the employer then proposed, and the union acquiesced in, a revision that called for participation by both union members and nonmembers in the ratification vote. The General Counsel noted that because nothing at first was said as to who would participate in the vote, the issue normally would be an internal matter that the union could resolve unilaterally. But the General Counsel then concluded that the evidence of a subsequent agreement on full employee participation was clear enough, and the employer could refuse to execute as long as ratification was not conducted in accordance with the parties' agreement.

[15] 295 NLRB 626 (1989), petition on review granted sub nom. *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990).

period of several contracts to allow the employer to engage in direct negotiation with unit members over retirement benefits. Similarly, in *Sacramento Union*,[16] the union and the employer found it mutually advantageous to negotiate an agreement both as to the date by which employee ratification must take place and as to the favorable recommendation which the bargaining committee was to make to the voting employees. Against this backdrop, if indeed the parties have made employee ratification a part of the bargain, it is altogether appropriate that the Board give a measure of protection to the expectancy interests of the parties. The upshot of today's decision is that it can no longer be unqualifiedly said as it was in *Martin J. Barry*, supra, that an employer ''has no standing to question'' the manner in which a union obtains ratification of a labor agreement.

II.

Application of the foregoing principles to the facts here warrants dismissal of the complaint, much as the facts supported dismissal of the charge by the General Counsel in *Nichols Homeshield*, supra. The issue of employee ratification was not just mentioned in passing by the Union. Because of concerns that the unit employees might not react favorably to an aspect of the Union's wage proposal, the Employer and the Union discussed the advisability of submitting the contract to a ratification vote of all the unit employees, not just union members. They agreed to such a procedure, and reviewed the specifics of time and location. The parties' negotiating team then drew up and signed a written agreement memorializing the fact that they had reached a tentative labor contract that they ''recommended to . . . *members of the bargaining unit* for ratification . . . .'' Thereafter, the Union made three unsuccessful efforts to obtain the necessary approval from the unit employees, before it resorted to a vote of the sole union member at the plant. Clearly, the parties entered into the type of express agreement under which the Union had voluntarily waived its right to define the terms of ratification and adequate compliance with them. Until such time as the Union fulfilled the conditions provided in the parties' written memorandum, the Respondent was not under an obligation to execute the bargaining contract.

[16] 296 NLRB 477 (1989).

Frank F. Rox Jr., Esq., for the General Counsel.
Thomas A. Sarnecki, Esq., of Fullerton, California, for the Respondent.
Eugene E. Heinz, of Tampa, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge was filed on March 15, 1988, by International Brotherhood of Firemen and Oilers, AFL–CIO (the Union), and an amended charge on April 15, 1988. Complaint issued on April 25, 1988, and, as amended at the hearing, alleges that Beatrice/Hunt-Wesson, Inc. Peter Pan Plant (Respondent or the Company) violated Section 8(a)(5) of the National Labor Relations Act (the Act) by refusing to execute a collective-bargaining agreement on which the parties had agreed, and Section 8(a)(1) of the Act by polling its employees concerning said agreement and asserted ratification thereof.

A hearing was held before me on these matters on June 16, 1988, in Albany, Georgia. Thereafter, the General Counsel and the Respondent submitted briefs. On the entire record, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business located at Sylvester, Georgia, where it is engaged in the production of peanut butter. During the calendar year preceding issuance of the complaint, a representative period, Respondent sold and shipped from its Sylvester, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The amended pleadings establish that International Brotherhood of Firemen and Oilers, AFL–CIO, Local 284, was certified by the Board on May 18, 1987, as the collective-bargaining representative of Respondent's employees in an appropriate unit. I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Summary*

1. The campaign, the certification, bargaining history, and tentative agreement

During the Union's campaign which led to a Board election and the Union's certification, the Union distributed literature to employees stating that the employees would have a right to vote on a contract and to decide the contract proposals.[1] In the Board election, 49 voters voted in favor of representation by the Union, and 44 voted against such representation. Thereafter, as indicated, the Union was certified on May 18, 1987.

Contract negotiations began in August with each party represented by a committee. The principal spokesperson for the Company was Richard McCall. International President James

[1] R. Exh. 5. Testimonies of International Representative Eugene E. Heinz and Union Bargaining Committee Member Myron L. Brown.

Walker was the spokesperson for the Union during the first two sessions and was later replaced by International Representative Eugene E. Heinz.

During the first session, Company Representative McCall commented on the closeness of the vote, discussed ratification of any agreement, and asked International President Walker whether the Union intended to represent all the employees in the bargaining unit, including those who had voted against the Union. Walker assured him that this was the Union's intention. He told McCall that the Union would charter a new local solely for the benefit of Peter Pan employees, a statement later repeated by Union Representative Heinz. This position was later abandoned by the Union.

During subsequent meetings, the parties reached agreement on many terms of an agreement and ''signed off'' on them. Discussion of wages centered on the Company's existing length-of-service pay premiums. The Company gave employees a wage increase of 10 cents hourly, which it called a premium, for every year of employment up to a maximum of 5 years. Company Representative McCall credibly testified that Union Representative Heinz wanted an increase in the overall rate structure and that Heinz told McCall that ''the people'' would give up length-of-service premiums in return for an overall wage increase of 3 percent. McCall testified that he expressed surprise at this proposal because of his belief that, although some employees would receive immediate wage increases, others would receive less pay because of loss of their length-of-service premiums. Subsequent to the negotiations, McCall calculated that 2 years after the effective date of a contract only 8 employees out of 85 would be at a higher hourly rate than they would have been under the length-of-service plan. McCall averred that the Company favored the length-of-service plan because it tended to retain employees and that he explained his reservations about the new wage program to Heinz.

McCall testified that final agreement was reached by the parties after extensive negotiations on November 17. As later printed, the contract provided for wage increases effective February 29, 1988, a wage opener 2 years after the effective date of the contract, elimination of length-of-service premiums, and further provided that no employee's rate would exceed that set forth in the contract.[2]

McCall testified that Union Representative Heinz agreed that this wage structure would be ''subject to ratification.'' According to McCall, Heinz also expressed concern about some of his committee members ''backing water on their support between that time [November 17] and the ratification vote.'' In his testimony, Heinz denied that ratification had been ''extensively'' discussed during the November 17 bargaining session but admitted that the Union agreed that the contract ''would be voted on in the plant conference room,'' and that the ''ratification vote'' would take place over a span of 5 or 6 hours.

Heinz requested that McCall draft a memorandum. According to McCall, it was to reduce to writing ''our agreement to recommend ratification.'' According to Heinz, it was to set forth what the parties had done and that this was the best they could obtain. Further, according to Heinz, the memorandum ''was to be used as a tool, a selling point to the employees.''

[2] R. Exh. 3; G.C. Exh. 5—Appendix A.

At a bargaining session the next day, November 18, McCall presented to Heinz a memorandum of agreement which he had written and asked him to review it. Heinz did so, and all the representatives of the parties signed a document which ''recommended to the management of the company and members of the bargaining unit . . . ratification as soon as possible.''[3] Although he signed this document, Heinz denied that he ever agreed to ratification by unit employees as a condition precedent to a binding contract. In a pretrial affidavit, Heinz stated that Union Committee Members Myron Brown and Jimmy Mathis told employees that all employees who voted in the election could vote on ratification of a contract. At the hearing, Heinz contended that Brown and Mathis ''misunderstood'' eligibility for voting.

On November 25, McCall mailed Heinz a copy of the collective-bargaining agreement in final form. The signature page of the agreement began as follows: ''This agreement, having been duly ratified by the bargaining unit, is signed this _____ day of _____ 1987 by the authorized representatives of the parties.'' The document indicates that its effective date was December 1, 1987, and that it extended through November 30, 1990. McCall's cover letter states that in the event of ''typographical errors obviously the language agreed upon and signed at the bargaining table will prevail.''[4] McCall mailed copies to the plant for execution, ''assuming ratification.'' Union Representative Heinz testified that he received the copy from McCall in November, reviewed it, and took issue with the phrase on the signature page, ''having been duly ratified by the bargaining unit.'' However, Heinz did not bring the matter to McCall's attention because, he asserted, McCall's letter provided for the correction of ''typographical errors.''

2. The first ratification vote, November 30

On November 23, Union Representative Heinz mailed a notice of a vote on the contract to be conducted November 30 in the Company's conference room between 11 a.m. and 5 p.m. The heading on the notice stated that it was directed to ''Beatrice/Hunt Wesson, Inc. Employees,'' while the salutation was addressed to ''Dear Brothers and Sisters.''[5] After summarizing the provisions of the contract, the notice continued: ''Now it is up to you, the members, to determine if you want to accept this tentative contract.'' Attached to the notice were union membership and dues application forms; the notice requested employees to sign and return them to Union

[3] The memorandum of agreement is dated November 18, 1987, and reads as follows:

> The undersigned committee members unanimously agree to each and every provision signed by the parties as agreed to during the negotiating sessions resulting in a completed tentative agreement on November 18, 1987. This agreement is recommended to the management of the Company and the members of the bargaining unit for ratification as soon as possible.
>
> The undersigned committee members believe this agreement to be the best available for each party based upon our proposals, counter-proposals and compromises as reached through the collective bargaining process.
>
> Signed this 18th day of November 1987 at Albany, GA. [G.C. Exh. 8.]

The word ''unit'' in the memorandum is written over another word. Questioned about this, McCall testified that he inadvertently first began to write the word ''committee'' (which appears later in the memorandum), and then corrected this with the word ''unit.'' McCall's explanation was not contested, and I accept it.

[4] R. Exh. 2.

[5] R. Exh. 1.

Committee Member Myron Brown or to either of two other union representatives.[6] Brown testified that the Union had no members as of the date of the memorandum of agreement, 12 days before the ratification vote.

Heinz affirmed that he composed and ''submitted the notice through the U.S. mail.'' He also contended that he could not recall whether he ''mailed it from Tampa [the Union's headquarters] to the employees that had applied for membership or [whether] it was distributed by the bargaining team members,'' and did not know who received the notice. In any event, Heinz asserted, it was his intention that it be distributed only to applicants for union membership and pointed to the ''Dear Brothers and Sisters'' salutation in the notice. However, Heinz admitted that the union membership and dues authorization forms attached to the notice were blank and that the notice was thus directed to employees who had not signed an application form. Heinz also agreed that none of the Union's literature specifies that voting was limited to union members or member applicants and that he did not so inform the Company. Union Committee Member Brown testified that the notice was ''what was presented to the employees at the Company via the mail.'' Based on this testimony and Heinz' admission that it was he who mailed the notices, I conclude that Heinz mailed copies to all company employees. Although it is theoretically possible that he mailed the notices in bulk to the bargaining committee which in turn distributed them individually, there is no record evidence of this and no indication of it in the testimony of committee member Brown.

Brown testified that he ''assumed'' that all employees could vote on the contract, stated this to employees in the plant, and so advised Heinz.

Heinz testified that all employees were permitted to vote on November 30, although the voting was not ''designed'' that way. He maintained that he and Union Business Agent Ernest Webb instructed union committee members that only individuals who had signed union application forms would be permitted to vote. Heinz contended that he had about 63 union membership applications at that time. However, about 3 months later, on February 28, 1988, the Union assertedly ratified the contract with only one voter voting on it—the only one ''permitted'' to vote according to Heinz. Union Committee Member Brown asked Business Agent Webb in February whether the Union could ratify the contract ''without any membership,'' and Webb replied that it was ''perfectly legal.'' Brown also testified that the Union had no members at the time of the November 30 vote.

Because of the short time span between the Union's November 23 mailing of union application forms and the voting 7 days later, Brown's testimony that the Union had no members on November 30, and the fact that only one voter (union member or member applicant) was eligible to vote about 3 months later on February 28, I do not credit Heinz' testimony that he had about 63 member applicants on November 30.

During the polling process on November 30, according to Heinz, an employee who was opposed to the Union and the contract demanded the right to vote. In order to avoid ''animosity,'' Heinz averred, employees who had not signed union application forms were allowed to vote. According to Union Committee Member Brown and Heinz, five or six copies of the draft agreement prepared by the Company were on a large table. Heinz testified that he did not advise the voters about his disagreement with McCall's language on the signature page that the contract was subject to ratification by the bargaining unit.

The result of the voting was 50 votes against the contract and 24 in favor of it. Union Agents Heinz and Webb walked into Plant Manager Daniel P. Nolan's office shortly after 5 p.m. ''Do we have a contract?'' Nolan asked. ''No, we do not,'' Heinz replied. ''I'm very disappointed.'' He and Webb then left.

3. The bargaining session on January 6, 1988

Union Representative Heinz and Company Representative McCall had a telephone conversation after the November 30 vote and decided that another bargaining session would be advisable with the assistance of a Federal mediator. The meeting was held on January 6, 1988, and resulted in some change in the agreement. As noted, the draft presented by the Company had as its effective date December 1, 1987. According to McCall, the parties agreed on January 6, that the effective date would be the date of ratification, although McCall contended that this was not really a change. The contract provided for a wage opener 2 years into the agreement, and the parties concurred that this would take place 2 years from date of ratification and suspension of the length-of-service premiums. In the event the contract was not ratified by February 29, 1988, wage adjustments would take place the first Monday following ratification. McCall pointed out the advisability of early ratification, because additional employees were reaching the anniversary dates of their length-of-service pay increases, and delayed ratification would result in more of them being subject to a reduction in pay. There was no discussion of ratification procedure.

McCall again offered the Company's conference room for the voting. Heinz declined the offer and left the meeting saying, ''We'll vote it again, and we'll do it right this time.''[7]

4. The second ratification vote, January 23, 1988

Union Committee Member Brown testified that in early January 1988, Union Representative Heinz stated that only employees who had applied for union membership would be allowed to vote on the contract. Brown received verbal notice of a vote to be conducted in a church in Sylvester on January 15. Asked who was eligible to vote, Heinz replied that ''the meeting was scheduled for members only.''

Brown arrived at the church, but no vote was conducted. According to Brown, ''a lot of employees were irate [because] they thought that . . . all hourly employees was [sic] to be able to vote.'' Some employees brought circulars distributed by the Union prior to certification stating that employees would be allowed to vote on a contract. ''So the meeting was called off and rescheduled for a later date because of all the uproar . . .'' Brown testified.

Brown again received verbal notice of a meeting to be held at the same church on January 23. He wrote a notice announcing the location and date, and placed it on the bulletin board. Brown testified that ''anyone'' was allowed to

[6] Id.

[7] McCall's uncontradicted testimony.

vote. According to Union Representative Heinz, the vote was 24 to 19 against ratification of the contract.

5. The televised meeting at Knights Inn on February 3, 1988

On January 26, Heinz prepared a notice with the heading ''Attention: Beatrice Hunt/Wesson Union Members'' and the salutation, ''Dear Brothers and Sisters.'' It outlines the contract's provisions and tells the employees ''who are Dues Paying Members, to determine if [they] want this contract.'' The notice describes two meetings to be held on the afternoon of February 3, at the Knights Inn, a local motel, and states that ''only dues paying members of the Union will be permitted to attend.''[8] Heinz asserted that this notice was mailed to employees who had applied for union membership.

A local television station made a news report on February 3, about events which occurred at the Knights Inn. The report stated that about 30 company employees protested the meeting, claiming that it was a secret union meeting to vote on a contract which the employees had twice voted down. One employee appeared on camera and stated that she was not allowed in the door unless she paid $13.50. Union Representative Heinz was televised and denied that any vote was being conducted.[9] Heinz testified to the same effect at the hearing and asserted that the purpose of the meeting was to solicit union membership applications and ''discuss the tentative agreement.''

6. The Union's acceptance of the contract

Union Representative Heinz testified that a vote on the contract was held on February 28, and that it was approved. As previously indicated, only one vote was recorded because, according to Heinz, ''Those were the only members we had that were permitted to vote.'' There were 96 employees in the bargaining unit according to Heinz.

Union Committee Member Brown did not vote. Heinz testified that Brown told him that ''he wanted to vote for the contract [and] wanted it signed, and wanted to be a union member.'' Brown testified that he was not asked whether he wanted to accept the contract—Business Agent Webb told him that the Union had already accepted it. Asked whether he had any objections, Brown replied to Webb that he had none. As noted, he asked whether the Union could accept the contract ''without any membership.'' ''Sure,'' Webb replied, ''We can do that without any membership. That's no problem. We're perfectly legal and within our rights to do that.''

On the following day, February 29, Union Representative Heinz sent Company Representative McCall the following telegram:

> THIS IS TO ADVISE YOU THE TENTATIVE COLLECTIVE BARGAINING AGREEMENT AGREED UPON ON JANUARY 6, 1988 COVERING EMPLOYEES EMPLOYED IN YOUR SYLVESTER, GEORGIA OPERATION IS ACCEPTED AND APPROVED. KINDLY SEND ALONG TO ME THE FINAL DRAFT FOR SIGNATURE AS SOON AS POSSIBLE.[10]

Company Representative McCall had seen on February 22 a copy of the Knights Inn televised newscast. He testified that it ''concerned'' him, because it was ''the first concrete evidence [of] an attempt at something other than ratification by members of the bargaining unit at large.'' He placed a call to Heinz on February 26, and received a return call on February 29. McCall started discussing the effect of not having an agreement by February 29. Heinz replied that they had ''a deal,'' and read the telegram which McCall had not received. He replied that he was ''anxiously'' awaiting its arrival. When the telegram was delivered, according to McCall, he was surprised at the absence of any reference to ratification.

McCall then placed a call to Plant Manager Nolan and asked whether he was aware of any ratification of the contract. On receipt of Nolan's advice that he had no such knowledge, McCall instructed Nolan to ''verify'' with members of the bargaining committee whether ratification had taken place. Nolan called three individuals into his office, read Heinz' telegram to them, and asked whether a ratification vote had taken place. Union Representative Myron Brown said that none had taken place as far as he knew,[11] while Wendell Henderson said nothing. The third union representative, according to Nolan, was Jimmy Mathis, who contended that there was no legal requirement that the Union conduct a vote.[12]

Nolan called McCall and notified him that no ratification had taken place as far as he could determine. On March 1, 1988, McCall sent the following telegram to Heinz:

> YOUR TELEGRAM OF FEBRUARY 29, 1988 MAKES NO REFERENCE TO RATIFICATION. THE TENTATIVE AGREEMENT IS CONTINGENT UPON RATIFICATION BY MEMBERS OF THE BARGAINING UNIT (SEE MEMORANDUM OF AGREEMENT DATED NOVEMBER 18, 1987). THE AGREEMENT FOLLOWING THE JANUARY 6, 1988 MEETING WAS TO BE EFFECTIVE ''FROM THE DATE OF RATIFICATION FOR A THREE YEAR PERIOD.'' ANY APPLICABLE WAGE INCREASE WAS TO BE EFFECTIVE THE MONDAY AFTER RATIFICATION IF THE RATIFICATION WAS ON OR AFTER FEBRUARY 29, 1988. BASED UPON LOCAL MEDIA COVERAGE ETC., THE COMPANY DOUBTS RATIFICATION HAS BEEN COMPLETED. PLEASE ADVISE THE DATE OF RATIFICATION AND NUMBER OF VOTES FOR AND AGAINST.[13]

7. Respondent's polling of its employees

On March 8, 1988, Heinz mailed McCall a letter with two copies of the Union's version of the final agreement signed by the Union's representatives. The letter asserted that February 28, 1988, was the effective date of the agreement since it was ''the date of ratification and approval.''[14] Heinz made several changes in the agreement—numbering of the sections, language changes which did not alter meaning, and dates predicated on a February 28 effective date of the con-

[8] R. Exh. 4.

[9] R. Exh. 6, a cassette.

[10] G.C. Exh. 2.

[11] Brown testified that he was ''frustrated'' by the Union's contention that ratification had taken place, and believed that he ''was being called a liar.''

[12] Union Committee Member Brown agreed with Nolan's account, except that he asserted the third member at the meeting was Company Personnel Manager Martha McGee. I consider it unnecessary to resolve this difference between Nolan's and Brown's testimonies.

[13] G.C. Exh. 3.

[14] G.C. Exh. 4.

tract. The signature page is different from that in the draft submitted by McCall, and omits any reference to ratification by the bargaining unit. According to Heinz, neither party submitted a draft of a signature page and he ''took the liberty'' of inserting this page. Heinz stated that he had authority to make this change because McCall's cover letter with his draft permitted correction of ''typographical errors.''

McCall noted the omission on receipt of the letter and testified that he had ''considerable doubt'' that ratification had taken place because of his viewing of the Knights Inn television tape and the report from Plant Manager Nolan that no ratification vote had been conducted. He believed the Company to have ''three options,'' all of which were ''untenable.'' If it executed the contract and no ratification had taken place, McCall thought that the Company might be liable to the employees under various legal theories. If the Company did not execute the contract and ratification had indeed taken place, then the Company might be committing an unfair labor practice. Or, McCall continued, the Company could do nothing ''at its peril.''

Considering this ''potential exposure,'' McCall decided to poll the employees and secured the approval of his superior. He prepared two forms for the polling. The first one was entitled ''Verification of Ratification,'' and asks two questions—whether the voter was notified of and participated in a ratification vote on February 28, 1988. The second form is entitled ''Secret Ballot—Straw Poll on Ratification,'' and asks whether the voter ''approve[s] of and want[s] to work under the tentative agreeement recommended . . . by the Union leadership.'' Each question on both forms is followed by ''Yes'' and ''No'' boxes.[15] McCall testified that he selected the language on the secret ballot because of employee questions to supervisors concerning union membership and the coverage of any union contract. McCall transmitted the forms and instructions to Plant Manager Nolan.

Nolan directed supervisors to have the employees report to the lunchroom on March 11. There were two meetings, the first at 6 a.m. for the first and third shifts, and the second at 4:30 p.m. for the second shift. Members of the Union's bargaining team were present. Nolan informed employees that he would like to discuss the status of the Union and had a question. He read to the employees the exchange of letters and telegrams between the parties and the memorandum of agreement and stated that the Company had some doubt as to whether ratification had taken place. Nolan read the verification form aloud and passed out copies together with pencils. He informed the employees that their cooperation was ''strictly voluntary,'' and asked them to indicate their name and the date of the poll.

Nolan collected the forms with the assistance of Personnel Manager McGee and placed them on a table. He then read the secret-ballot form, said that there was a box in the front of the room, stated that he did not want to ''coerce or intimidate'' anybody, and left the room while the employees filled out the secret ballot. Nolan did not discuss union matters or offer employees an opportunity to ask any questions. He did not voluntarily disclose the poll results to the union committee members but did not refuse to supply any information.

Union Committee Member Myron Brown corroborated Nolan's testimony. Although Brown had signed the contract draft submitted by Heinz to McCall, he did not complete a ballot on the contract because of his ''frustration'' with the Union's report that ratification had taken place.

On the day of the poll, March 11, McCall called Heinz and sent him the following telegram:

> INDEPENDENT VERIFICATION REVEALS NO RATIFICATION BY ''THE MEMBERS OF THE BARGAINING UNIT.'' OUR AGREEMENT REMAINS TENTATIVE SUBJECT TO RATIFICATION BY THE MEMBERS OF THE BARGAINING UNIT. A STRAW POLL EFFORT TO VERIFY YOUR CLAIM OF RATIFICATION OF THE TENTATIVE AGREEMENT RESULTED IN A VOTE OF 64 NO AND 6 YES.[16]

As indicated, 4 days later, the Union filed the initial charge in this proceeding.

B. *Legal Analysis and Conclusions*

1. The alleged violation of Section 8(a)(5)

The complaint alleges that Respondent violated the Act by refusing to execute a collective-bargaining agreement on which the parties had agreed. The evidence shows that the parties had agreed on a ''tentative'' contract. The principal issue is whether they also agreed that ratification by the members of the bargaining unit was a condition precedent to a binding contract. It is well established that such a condition is a nonmandatory subject of bargaining.

The first problem is interpretation of the memorandum of understanding executed by the parties on November 18, 1987. To start with the language of the memorandum itself, the representatives of the parties ''recommended'' a ''completed tentative agreement'' to the management of the Company ''and the members of the bargaining unit for ratification as soon as possible.'' The General Counsel argues that this does not constitute an agreement that such ratification was a condition precedent to a binding contract. Although the memorandum's reference to ''members of the bargaining unit'' seems clear, the General Counsel argues that the memorandum was ''essentially a side agreement outside the four corners of the contract,'' and that it merely ''recommends'' acceptance of the negotiated contract. Surely, the General Counsel argues, the parties did not intend *management* to vote in a union ratification process. Had the parties intended to make the contract contingent on ratification by unit employees, the contract would have so stated.[17]

The issue divides into two separate questions. Was ratification or approval by anybody a condition precedent to a binding agreement? If so, by whom? With respect to the first question, the use of the word ''tentative'' to describe the contract in the memorandum of agreement suggests that the contract was not binding, although it was in ''completed'' form. Extrinsic evidence supports this inference. May such evidence be relied on in order to interpret the contract? On this question, the following language of the Court of Appeals for the Fifth Circuit is relevant:

> Admission of extrinsic evidence to resolve an ambiguity is proper in interpreting any contract. Moreover, as noted above, rules governing the interpretation of ordi-

[15] G.C. Exh. 1(c).

[16] G.C. Exh. 6.

[17] G.C. Br. 4.

> nary contracts are not strictly applicable to collective bargaining agreements. Rigid restrictions on the admission of parol evidence in this context are inappropriate [authorities cited]. [*NLRB v. L. B. Priester & Son, Inc*., 669 F.2d 355, 365 (5th Cir. 1982), enfg. 252 NLRB 236 (1980).]

The first extrinsic evidence in support of a finding that the parties intended ratification or approval by somebody as a condition precedent to a binding contract is the fact that the Union submitted the contract to a ''vote'' on three occasions, refrained from accepting the contract after two unfavorable votes, and did not accept it until a favorable vote had been obtained (one vote on February 28, 1988). If the Union had not intended ratification or approval by somebody as a condition precedent to a binding agreement, then its repeated submission of the contract to a vote constituted meaningless activity resulting in undue delay. Further extrinsic evidence that this was the Union's intention is its notice on November 23, 1987, announcing a vote on November 30—''Now it is up to you, the members, to determine if you want to accept this tentative contract.'' Again, on January 26, 1988, the Union announced a meeting on February 3 ''to determine if [union members] want this contract.''

The fact that the Company, the other party to the contract, intended the same thing is shown by the signature page on Respondent's November 25 draft copy of the contract with its inclusion of the phrase, ''having been duly ratified by the bargaining unit . . . .'' Union agreement with this interpretation is further shown by the fact that it did not dispute this asserted requirement at the time of receipt of the Company's draft, made copies thereof available to employees who participated in the November 30 vote without expressing disagreement, and eliminated but did not expressly disavow the clause in its late February acceptance of the contract. Union Representative Heinz' contention that the Company's inclusion of the phrase was a mere ''typographical error'' has no merit.

As noted, the effective date of the contract in the Company's draft was December 1, 1987. After the rejection of the contract in the November 30 vote, the parties on January 6, 1988, agreed to change the date of the wage reopener to read 2 years after the date of ratification, thus indicating the determinative effect of ratification on one of the terms of the contract. As indicated, the Union on March 8, 1988, eliminated from its draft of the contract reference to its having been ''ratified by the bargaining unit.'' However, in the cover letter accompanying the Union's draft, it told the Company that February 28, 1988, was the effective date of the contract since it was ''the date of ratification and approval.''

With respect to the identity of those individuals the parties intended to ratify the contract, the memorandum of agreement's language is clear—''the members of the bargaining unit.'' That this language unambiguously expressed the agreement of the parties is manifested by the fact that the Union mailed notices of the November 30 vote to all bargaining unit employees, and thereafter allowed them to vote. Union Representative Heinz' asserted ''intention'' to allow only union members or member applicants to vote is insufficient to negate this inference—there were no union members on November 30 and no credible evidence that there were any applicants for membership.

It is apparent that Heinz became disenchanted with the agreed-on electorate of bargaining unit members after the adverse vote on November 30, and attempted to restrict voting to union members on January 15, 1988. When this was canceled because of an ''uproar,'' the Union again permitted voting by unit employees on January 23, and the vote was still against ratification.

Finally, the Union's intention to require ratification by bargaining unit members is manifested by its distribution of precertification literature to employees stating that they could vote on a contract; by Heinz' concern about lack of support for his wage proposal and his statement, on signing the memorandum of agreement that it would be used as ''a tool, a selling point to the employees;'' and by the actions of Union Representatives Brown and Mathis in telling employees that all those who voted in the election could vote on ratification of a contract. The final asserted ratification on February 28 by one ''eligible'' voter in a unit of 96 employees may appropriately be characterized as a distortion of the manifested intention of the parties.

The Board has concluded that the parties intended to condition final agreement on approval by other persons based on evidence less substantial than that herein—where the employer's representative stated at the outset of negotiations that any negotiated agreement had to be approved by the employer's board of trustees;[18] where one party stated that ''[t]hey would take the contract back for ratification and we would do the same;''[19] and where the employer's apparent acceptance of a union offer was withdrawn prior to union ratification of the contract, which was found from the bargaining history to be a condition precedent to a final agreement.[20]

The Board has had occasion to interpret contractual language similar to that contained in the memorandum of agreement. The final paragraph in that contract stated that the members of the union committee were ''pledged to recommend this agreement for ratification by the membership . . . .'' Thereafter, the Board found that ''the employees voted against ratification of the terms set forth in the instrument.'' *Merico, Inc*., 207 NLRB 101 (1973). In its analysis, the Board stated as follows:

> The use of this somewhat unusual legend raises the question of whether the signatures of the Union Committee on this document reflect an intent by them to bind the employees to the substantive terms in the instrument, irrespective of whether the employees subsequently ratified it. Our examination of the entire document, particularly the above-quoted paragraphs and apart from any parole evidence, clearly reveals that the Union Committee's action in signing the document was qualified by the phrase that they were unanimous ''for acceptance'' and each member is ''pledged to recommend this agreement for ratification by the membership.'' The use of the phrase ''for acceptance'' in this context indicates to us that although the terms were acceptable to the Union Committee, it was not purporting to accept them unconditionally on behalf of the employees. While the condition of ratification could have

[18] *Bronson Methodist Hospital*, 223 NLRB 95, 98 (1976).

[19] *Laborers Local 304*, 228 NLRB 247, 248 (1977).

[20] *Sunderland's, Inc*., 194 NLRB 118 (1971).

> been more artfully drawn, we conclude that, as a matter of contract interpretation, the signatures of the Union Committee reflected merely ''a signed agreement to pledge the Committee's support for ratification of the agreement,'' and did not evidence a binding contract absent employee ratification. [Id.][21]

The only substantial difference between the contract language in *Merico* and that in the memorandum of agreement herein is that in *Merico* it was stated in the contract whereas the memorandum of agreement was set forth in a separate document. This is a meaningless distinction, however, since the intention of the parties is equally manifested by the language to which they affixed their signatures, and ''all writings that are part of the same transaction are interpreted together.''[22]

The General Counsel cites *Newtown Corp*., 280 NLRB 350 (1986), where the employer contended that, by the union's deciding to take the employer's final proposal to a bargaining unit membership vote, it had thereby made the agreement's effectiveness contingent upon the unit members' ratification. The Board rejected this argument and noted that ''[t]here is no evidence of allegations in the record that the proposed contract's express terms required ratification or that the parties had ever agreed to a ratification requirement'' (id.). This case is inapposite because the parties herein did agree to a ratification requirement for the reasons set forth above.[23]

I therefore conclude that the parties herein agreed that ratification of the tentative agreement by the members of the bargaining unit was a condition precedent to a final and binding contract. Inasmuch as such ratification did not take place, the agreement never came into existence. Accordingly, Respondent did not violate the Act by refusing to execute it. I shall therefore recommend that this allegation of the complaint be dismissed.

2. The alleged unlawful polling of employees

The complaint alleges that Respondent, by polling its employees, thereby bypassed the Union and dealt directly with its employees. As set forth above, on November 18, 1987, the parties reached tentative agreement on a contract subject to ratification by the employees in the bargaining unit. Thereafter, the employees twice rejected the contract and the Union issued a notice of a meeting to be attended only by dues-paying members of the Union ''to determine if [they] want this contract.'' A televised newscast reported employee protests at this meeting, the Union denied that a vote was being conducted, and Respondent saw copies of the televised newscast. The contract was accepted on February 28, by one vote, cast by the only voter ''permitted'' to vote according to the Union. There were about 96 employees in the bargaining unit at that time. On receipt of advice from the Union that the contract had been ''accepted and approved,'' Respondent conducted the poll described above.

The General Counsel argues that the language of the polls ''goes far beyond asking if ratification occurred.'' By asking the employees whether they wanted to work under the contract, Respondent was impermissibly seeking to determine employee sentiment regarding the contract.[24]

The General Counsel cites *Obie Pacific, Inc*., 196 NLRB 458 (1972). In that case, a successor employer assumed an existing contract containing a provision requiring two employees in a particular job. Efforts by the predecessor to eliminate this provision had been unsuccessful, and the successor stated its intent to do ''anything'' to eliminate the provision. After the takeover, the successor discharged the union president for asserted business reasons, and thereafter polled the employees affected by the contractual provision. The purpose of the poll was to obtain the opinion of the employees as a basis for subsequent efforts to obtain modification of the clause from the union. The Board held that the employer had interfered with the ''exclusivity of the Union's agency,'' stating as follows:

> Respondent's obligation to bargain with the employee's exclusive agent demands that he accept and respect the exclusivity of that agency. While, under appropriate circumstances, an employer may communicate to employees the reasons for his actions and even for his bargaining objective, he may not seek to determine for himself the degree of support, or lack thereof, which exists for the stated position of the employee's bargaining agent. If we were to sanction such efforts, we would impede effective bargaining. [Id., 196 NLRB at 459.]

The Board applied the principles of *Obie Pacific* in a recent case where a successor employer declined to respond to union suggestions for a new agreement, and then polled its employees on their views concerning certain employee benefits which the union had previously attempted to obtain. In concluding that this was unlawful, the Board relied on the timing of the employer's actions, noting that it attempted ''to ascertain employee opinion prior to the bargaining—a job that belonged to the Union.''[25]

However, the Board distinguished *Obie Pacific* in another recent case where the employer had conducted a wage and benefit survey among its employees. In holding to this to be lawful, the Board stated as follows:

> *Obie Pacific, Inc*. . . . and the other cases cited by the judge in support of a finding of a violation here involved surveys conducted during or immediately preceding negotiations in which employees were questioned about specific contract proposals to be raised during negotiations. In those cases, the employers violated their obligation to bargain with their employees' exclusive bargaining representative because they sought to determine for themselves the extent of employee support for positions espoused by the union. Here, the evidence shows that the Respondent's purpose in conducting the survey was merely to determine whether its personnel policies and benefit programs were being

[21] The fact that the Board's interpretation of the contract in *Merico* was the result of a contract-bar issue is irrelevant.

[22] Restatement 2d *Contracts* Vol. 2, §§ 202, 226.

[23] The Board in *Newtown* also rejected the employer's arguments based on the union's constitution and bylaws—considerations which are not relevant in this case.

[24] G.C. Br. 6.

[25] *Alexander Linn Hospital Assn*., 288 NLRB 103, 106 (1988).

properly communicated to its most recently hired employees.[26]

In another case, the employer assumed a bargaining obligation which had been established with respect to a predecessor. After the beginning of negotiations, a majority of the employer's employees presented it with a petition stating that they did not wish to be represented by the union. Thereafter, the employer filed an election petition, the union filed unfair labor practice charges, and the Regional Director dismissed the election petition subject to reinstatement. The employer then posted two notices, the latter of which announced a secret-ballot election. No notice was given to the union. There were two blank ballots and 30 employees voted for the union while 97 voted against continued representation. The General Counsel contended that the poll violated the Act because the employer did not notify the union. In denying this contention, the Board stated as follows:

> The poll was conducted as a result of the presentation of a petition disavowing the Union signed by an overwhelming majority of employees. Thus, the Respondent possessed an independent, objective basis for polling its employees. Moreover, the record establishes that the Respondent verified the Union's continuing majority status without infringing upon the employees' Section 7 rights. The poll was conducted to ascertain the truth of the employees' *own* claim of loss of majority status, i.e., their 4 June petition, and this purpose was communicated to them in the 25 July announcement. That announcement assured employees there would be no reprisal regardless of the outcome of the poll, and it was conducted by secret ballot. . . . [U]nder the circumstances, we find that the failure to notify the Union that the poll would be conducted had a de minimis impact, if at all, on the conduct of the poll. The poll was fairly conducted, and the employees' dissatisfaction with representation is not attributable to any unlawful conduct of the Respondent. The processing of the Respondent's petition placed the Union on notice generally of the employees' dissatisfaction at least a month before the poll took place. For the foregoing reasons, we conclude that the poll conducted by the Respondent did not violate the Act.[27]

The Board has also declined to find polling unlawful when its timing did not suggest that it was intended to undermine the union,[28] and where it was in furtherance of bargaining rather than intended to bypass the union.[29]

In this case, there is no evidence that the Respondent attempted to undermine the Union. It did not ask employees their views on various positions prior to or during bargaining. The bargaining had been completed, and all Respondent was attempting to ascertain was whether the condition precedent to the existence of an agreement had taken place. There was nothing coercive about the poll. Although employees were asked voluntarily to sign the form concerning ratification and the employee's participation therein, this was information needed by Respondent because of the contractual requirement that ratification be made by bargaining unit employees. When the second poll was being conducted on the question of whether the employees wanted to work under the tentative agreement, Respondent's representative absented himself and the employees' ballots were placed in a ballot box. The General Counsel's argument that Respondent by the second poll was unlawfully seeking to determine employee sentiment regarding the contract has no merit. Respondent was obligated to execute the tentative agreement if it was ratified by the employees in the bargaining unit. How else could it determine the answer to this question without asking the employees? The Company had asked this information from the Union and had received no meaningful reply.

The Union's signing of the memorandum of agreement provided it with notice of the necessity of employee ratification, and it had already attempted to obtain this approval without success. Respondent, after the failure of the Union to provide the Company with adequate notice of ratification, conducted its own secret poll in a noncoercive manner at a meeting at which members of the bargaining unit were present. The results of the poll were consistent with the results the Union had obtained in its own polls. Since a majority of employees still opposed the contract, it did not come into existence. In these circumstances, Respondent's failure to give formal notice of the poll to the Union had, at most, a ''de minimis impact . . . on the conduct of the poll.''[30]

I conclude that Respondent was entitled to determine its legal obligations with respect to the tentative agreement, that its polling subsequent to bargaining about the ratification issue did not undermine or bypass the Union, and that it did not thereby interfere with its employees' Section 7 rights. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

In accordance with my findings above, and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Beatrice/Hunt-Wesson, Inc., Peter Pan Plant is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Firemen and Oilers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged by the complaint herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The complaint is dismissed in its entirety.

[26] *United Technologies Corp.*, 274 NLRB 1069, 1071 (1985).

[27] *Boaz Carpet Yarns*, 280 NLRB 40, 45 (1986).

[28] *Leland Stanford Jr. University*, 240 NLRB 1138 fn. 1 (1979).

[29] *Continental Oil Co.*, 194 NLRB 126, 131 (1971).

[30] *Boaz Carpet Yarns*, supra at 45.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.